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No. 03-1566

In the

Supreme Court of the United States

FRANCIS A. ORFF, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WASHINGTON STATE FARM BUREAU, AND IDAHO FARM BUREAU FEDERATION IN SUPPORT OF INTERVENOR-DEFENDANT-RESPONDENT WESTLANDS WATER DISTRICT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation, Washington Farm Bureau, and Idaho Farm Bureau respectfully move this Court for permission to file the attached brief amicus curiae in support of Respondent Westlands Water District.[1] Written consent for amici participation in this case was granted by counsel of record for Petitioners Francis A. Orff, et al., and Respondents Westlands Water District and the United States. Counsel for Respondent Natural Resources Defense Council has withheld its consent to the filing of this brief.

Pacific Legal Foundation (PLF), the largest and most experienced nonprofit public interest law foundation of its kind, has been litigating in support of the rights of individuals to make reasonable use of private property for over 30 years. PLF attorneys have argued before this Court on several occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF attorneys have also represented water owners and water users in lawsuits over federal reduction of water deliveries for endangered species. *See County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2094 (2004).

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Amici Washington Farm Bureau and Idaho Farm Bureau Federation are voluntary, nongovernmental, nonpartisan organizations of farm and ranch families in their respective states. These organizations seek solutions to the social and economic problems that affect farming and ranching families and are active on rural issues in the legislative, regulatory, and judicial forums. The Washington and Idaho Farm Bureaus promote production agriculture and protect the interests of their 90,000 members. Made up mostly of small property owners, many of the Farm Bureaus' members rely on federal projects to deliver the water they own or use. Because small, mostly rural water users are subjected to the same kinds of water reductions for the sake of endangered species that led to this litigation, the Farm Bureaus are gravely concerned about the outcome of this case.

Specifically, Amici seek to augment the arguments of Respondent Westlands Water District by clarifying that water rights are indeed a legally protected "real property right" created by state law and that the United States may not redeploy water wherever it pleases simply because it owns the delivery system for those rights. *See* Brief of Intervenor-Respondent Westlands Water District at 24. Further, Amici wish to bring to this Court's attention the frequency with which the United States redirects water for endangered species purposes. Finally, Amici buttress Respondent Westlands Water District's arguments regarding both the proper standard for attaining third party beneficiary status and the proper scope of the inquiry into third party beneficiary status.

For the foregoing reasons, Amici Pacific Legal Foundation, Washington Farm Bureau, and Idaho Farm Bureau respectfully request that this Court GRANT their motion for leave to file the attached brief.

DATED: January, 2005.

Respectfully submitted,

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QUESTION PRESENTED

Whether farmers are "intended" third party beneficiaries of their irrigation district's water service and repayment contracts with the United States Bureau of Reclamation and, therefore, entitled to sue the Bureau as the Federal Circuit has long held, or merely "incidental" third-party beneficiaries and, therefore, not so entitled as the Ninth Circuit holds in the decision below.

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of Amici are contained in the attached motion to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1993, the United States Bureau of Reclamation (BoR) unilaterally reduced its contractually required Central Valley Project (Project) water deliveries to Westlands Water District (Westlands) by 50%. *See Orff v. United States*, 358 F.3d 1137, 1141 (9th Cir. 2004). The impetus for this reduction was the listing of the Sacramento River winter run chinook salmon and the delta smelt of the Sacramento-San Joaquin Delta as "threatened" species under the Endangered Species Act. *Id.* The National Marine Fisheries Service (NMFS), in its consulting role to BoR, determined that continued operation of the Project would jeopardize the two fish species. *See id.* Petitioners, a group of farmers who are the ultimate beneficial users of the water that the Project delivered to Westlands, sued the United States under a number of theories including breach of contract. *See id.* at 1142. The Ninth Circuit dismissed the farmers' case, holding that the farmers are not parties to the contract nor do they qualify as "intended" third party beneficiaries who, though not parties to the contract, are nevertheless entitled to sue for breach of the contract. *Id.*

Amici support Westlands' arguments by explaining that water is indeed a protected property right and that it is important for this Court to expressly recognize that fact, given the frequency with which the United States appropriates water rights both from water districts and farmers for the alleged benefit of listed species. Further, Amici explain the proper inquiry and standard that courts should use in determining third party beneficiary status and note the importance of preserving the correct standard.

ARGUMENT

I

WATER RIGHTS ARE PROTECTED PROPERTY RIGHTS THAT THE GOVERNMENT MAY NOT SEIZE

A. Water Rights Are Protected Property Rights

This "right to use" water is nearly as old as Western civilization itself, extending to Justinian's Institutes. *See* Clifford W. Schulz & Gregory S. Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 Pac. L.J. 1031, 1039 (1988) (citing Justinian's Institutes and explaining that, "[a]lthough Roman law itself recognized [the right to use water], it was left to the civilians to develop more fully the incidents of private usufructuary rights in water."). Unsurprisingly, the common law of water dates to Blackstone. *See id.* at 1040 (explaining medieval England's development of law surrounding the right to use water).

As lower courts and scholars alike have recognized, water rights are not "lesser" or "diminished" property rights but are entitled to the full protection of the Constitution. *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996); *see also* Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. Colo. L. Rev. 257, 260 (1990) (explaining that "[w]ater rights are property" equal with any other form of property, though water rights do not enjoy "more protected status than any other sort of property").

This Court has also long recognized that water rights are protected property interests entitled to equal status with land. In *United States v. Great Falls Manufacturing Co.*, 112 U.S. 645, 656 (1884), for example, this Court was called to decide whether government could be held liable when it was "[b]eyond doubt [that] the land and the water-rights and privileges in

question have for nearly 20 years been held and used by officers and agents of the government, without any compensation whatever having been made." This Court repeatedly referred to the land and water rights as "these property rights" and ultimately determined that the government had "taken the property of the claimant for public use." *Id.* In its analysis, this Court drew no distinction between the water rights and the land but regarded each as protected property interests. This Court later confirmed this reading of *Great Falls* in *Juragua Iron Co. v. United States*, 212 U.S. 297, 304 (1909), noting that "the government is under a constitutional obligation to make compensation for any property or property right taken."

That water rights must be regarded as property interests equal to and entitled to the same protection as other property interests is not simply an academic issue; rather it is a matter of individual liberty. For the "fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). Indeed, government is designed to preserve individual liberty largely by securing rights to private property. *See* John Locke, *Second Treatise of Government* 66 (S.W. Gough ed., Oxford 1966) (1690); *see also Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765) ("The great end, for which men entered into society, was to secure their property."). Only a year after the Constitution was adopted, John Adams expressed the Framers' universally shared view that "'[p]roperty must be secured or liberty cannot exist.'" *Discourses on Davila, in* 6 *The Works of John Adams* 280 (Charles Francis Adams ed., Boston, Little Brown 1851), *quoted in Cannon v. Delaware*, 807 A.2d 556, 569 (Del. 2002). Property rights are key to personal liberty and "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Property rights are vital to a free society, and although the systems for acquiring water and distributing water rights have varied over time, water rights are property as much as land. Simply put, there is "no reason . . . why water rights, which are as vital as land rights, should receive less protection." *Hage*, 35 Fed. Cl. at 172. No matter what this Court decides, it should continue its unbroken practice of recognizing water rights as identical to and worthy of the same protections as other property.

B. Water Use and Certainty of Water Rights Are Vital in the West

It is beyond dispute that, "in the semi-arid to arid West, water is gold." Thomas F. Darin, *Waste or Wasted?—Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains*, 17 J. Envtl. L. & Litig. 281, 288 (2002). It is impossible to overstate the West's reliance on this scarce resource: "water is vital to the economic well-being of the western states." D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 Envtl. L. 1, 25 (1991). Given the western states' water dependence, certainty of one's water rights is vital. *See Arizona v. California*, 460 U.S. 605, 620 (1983) ("Certainty of rights is particularly important with respect to water rights in the Western United States."). Simply put, without sure and protected sources of water, the West cannot function. *See id.* ("The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country.").

It is no exaggeration to say that some land in the West is worthless without water. Indeed, water not only quenches thirsty crops and people, it has a profound impact on land values. In Washington State, nonirrigated farm or pasture land is worth $100 to $500 per acre; when irrigated the same land is

worth $3,000 to $15,000 per acre. *See This is the Washington Farm Bureau, available at* http://www.wsfb.com/StateFarmBureau/WaFarmBureauHistory.htm (last visited Jan. 6, 2005). Thus, eliminating irrigation by seizing water held pursuant to legally protected rights reduces land values, in some cases, to less than 1% of the original value.

Certainty in water rights has three aspects: "1) legal certainty; 2) tenure certainty; and 3) physical certainty." Kevin E. Regan, *Balancing Public Water Supply and Adverse Environmental Impacts Under Florida Water Law: From Water Wars Toward Adoptive Management*, 19 J. Land Use & Envtl. L. 123, 170 (2003). "Legal certainty" refers to protecting water from the illegal or wrongful actions of others. *Id.* "Tenure certainty" involves the protection of water rights against the lawful acts of others that may nevertheless interfere with water use. *Id.* "Physical certainty" relates to ensuring adequate sources of water against drought, poor weather, or other atmospheric problems. *Id.*

This case involves legal certainty in that the Petitioners claim the United States wrongfully withheld the water to which petitioners were entitled. Alternatively, this case involves tenure certainty in that, even if the ESA authorizes BoR to withhold the water due the farmers, they must not be left without a remedy for that loss. Notwithstanding other aspects of the Court's eventual holding in this case, it should uphold the legal or tenure certainty of water rights by affording water rights the same protections as other sticks in the bundle of property rights. *See United States v. Craft*, 535 U.S. 274, 278 (2002) (describing property as "a 'bundle of sticks' ").

This legal certainty in property rights is "a valuable asset that facilitates business and investing." Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 Wm. & Mary L. Rev. 1055, 1133-35 (2004). As innumerable

economists and philosophers have noted, and as the course of human history has proved, no one "will take the trouble to husband and maintain a resource unless he has a reasonable certainty of receiving some portion of the product of his management; that is, unless he has some property right in the yield." *See* Jonathan L. Adler, *Legal Obstacles to Private Ordering in Marine Fisheries*, 8 Roger Williams U. L. Rev. 9, 13 n.17 (2002) (quoting Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. Pol. Econ. 116, 116 (1955)). Certainty of legal rights and obligations associated with property is the cornerstone of private property. *See, e.g.*, Richard Posner, *Economic Analysis of Law* 32-33 (1992) (discussing need for certain and exclusive property rights); *see also* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 347 (1967) ("Property rights . . . derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others."). Without certainty, property is at best devalued and at worst impossible to transfer and thus valueless. Without water, property in the West is also devalued and worthless.

C. Congress Has Recognized the Importance of Water Rights by Mandating Deference to State Law Regarding Water Appropriation

Even the State of California, hardly Goliath in the property rights arena,[1] agrees that certainty of water use is a vital property right. California law recognizes the importance of affording water rights the same protections as other property. For example, California Water Code § 109(a) provides:

[1] *See San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 692, 41 P.3d 87, 121, 117 Cal. Rptr. 2d 269, 308 (2002) (Brown, J., dissenting) (explaining that private property is "an endangered species in California" and "entirely extinct in San Francisco.").

> The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.

Water rights, specifically certainty of water rights, must be protected in order to avoid catastrophe in the West.

Congress included this important concept in the Reclamation Act by providing that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. Thus, what constitutes beneficial use depends on the laws of the individual states, and Congress expressly deferred to state law regarding appropriation of water. Reading § 372 of the Reclamation Act properly in conjunction with § 383 shows that state law should be used to determine beneficial use when the water at issue is made available due to a Reclamation project:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or

> user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383.

This Court has previously noted Congress' deference to state law concerning water rights. The Court noted that the history of the reclamation relationship between the federal government and the Western States is both long and involved, but contains a consistent thread of purposeful and continued deference to state water law by Congress. *California v. United States*, 438 U.S. 645, 653 (1978). In *California*, this Court noted the precise nature of the deference to state law as it relates to the question in this case:

> From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects: First, and of controlling importance in this case, the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law. . . . The Secretary of the Interior could not take any action in appropriating the waters of the state streams "which could not be undertaken by an individual or corporation if it were in the position for the Government as regards the ownership of its lands."
>
> . . . .
>
> Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law.

California v. United States, 438 U.S. at 665-67. Under California law, nobody can obtain a water right unless he is diverting the water and putting it to beneficial use. If the opposite were true, it would be possible for speculators to acquire huge quantities of water and simply apportion the water

as they saw fit, charging exorbitant prices without regard to use. Or, as with BoR in this case, the nonuser owner could randomly choose whether to deliver needed irrigation water in a particular year and instead use it for another purpose, thus utterly destroying the certainty that is such a necessary component of irrigated agriculture.

Congress' reasons for deferring to state water law were sound: if federal law applied to reclamation projects and water therefrom, two potentially inconsistent water management systems would operate within each state: a federal water law system and a state water law system. *Id.* at 668-69. Legal and practical chaos would be the order (or disorder) of the day.

Under state law, water users who prove they have or will beneficially use the waters of the State of California acquire a right to use that water. This water right, once acquired in part as a result of the water delivery contract, is a protected property right.

D. This Court Has Long Held That Water Users Hold at Least a Beneficial Ownership Interest in the Water Rights Used to Obtain Water from BoR Facilities

This Court has, on a number of occasions, considered whether parties such as the farmers in this case possess water rights in water provided by irrigation facilities, and has concluded that, at a minimum, such parties retain a significant beneficial ownership interest. *See Nevada v. United States*, 463 U.S. 110, 126-27 (1983). According to this Court, the United States holds, at most, a nominal ownership interest that has also been described as mere title: It is "simply a carrier and distributor of the water." *Id.* at 123.

The seminal case is *Ickes v. Fox*, 300 U.S. 82 (1937), in which the underlying issue was whether the United States could reduce the amount of water delivered to irrigated lands from

4.84-acre feet of water to 3.0-acre feet of water. This Court held that the United States could not:

> Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.

Id. at 94-95; *see also id.* at 96 (stating that respondents have fully discharged all their contractual obligations; their water rights have become vested; and ownership is in them and not in the United States.).

A few years later, this Court again considered the issue of water rights ownership in Reclamation Project water in *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945). The Court quoted *Ickes*, and then emphasized the point:

> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.

Id.

In 1978, the Court again considered the issue of ownership of water rights in water which is stored in Reclamation facilities, and favorably quoted *Ickes v. Fox*, holding:

> "All of these steps make plain that [the Reclamation] projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937)."

California v. United States, 438 U.S. at 677 (quoting *Nebraska v. Wyoming*, 325 U.S. at 613-14). The Court went on to recount the portions of *Ickes* quoted above, noting the United States' role as water deliverer, not as water owner.

Finally, this Court again considered the nature of water rights associated with irrigation projects in a case in which the United States essentially attempted to reallocate water rights from irrigators to the Pyramid Lake Indian Reservation. The Court was blunt in holding the United States did not have ownership interests in the water rights which would allow it to take that action:

> [W]e conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's ownership of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Nevada v. United States, 463 U.S. at 126; *see also id.* at 127 (stating the government had obligations that necessarily devolve upon it from having mere title to the water rights for the

Newlands Project, when the beneficial ownership of these water rights resides elsewhere).

E. Government May Not Commandeer Water for Its Own Purposes but Must Deliver That Water to the Districts and the Farmers for Beneficial Use

Clearly then this Court has duly noted and approved continued deference to state water law since Congress enacted the Reclamation Act in 1902. Specifically, this Court has noted that users of water taken from BoR storage facilities are at least the beneficial owners of the associated water rights and that, in contrast, BoR's ownership interest is nominal at most. *See, e.g., Nevada v. United States*, 463 U.S. at 126. As Westlands points out, BoR does not own the water it delivers but rather owns a delivery system for the water; that is, to the extent BoR has any right to this water, it is the right to supply it to Westlands for the farmers' ultimate beneficial use. *See* Brief of Intervenor-Respondent Westlands Water District (Westlands Brief) at 29 (explaining that the United States has a "nominal interest" and that the "water rights would not exist" without the farmers application of the water to th land). This is true because the right to take water out of a river or stream in California is contingent upon putting it to a beneficial use. *See* Cal. Const. art. 10, § 2 ("Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses."). Absent the farmers' use of the water stored in the project, storing it would be purposeless. That is, until the farmers apply the water to the land, there is no beneficial use. A diversion without beneficial use is a half without a whole, and is nothing more than the wasteful hoarding of water.

Given the beneficial use requirement and the fact the Project exists to deliver water for the beneficial use of farming, it is unlawful for BoR to commandeer the water for use by salmon and delta smelt. Unfortunately, BoR has a penchant for reallocating irrigation water from farmers allegedly to benefit wildlife. For example, *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246 (2003), involved nearly identical circumstances to this case. There, BoR reduced water deliveries to California water users to protect the same species involved in this case, *see id.* at 247, a decision which resulted in a $13,915,364.78 takings verdict, *see id.*

Though the *Tulare Lake* water users were ultimately awarded compensation, this is not always the case. The court in *County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081, 1082 (9th Cir. 2003), for example, approved another federal appropriation of water. There, the farmers owned a right to draw water from the Chewuch River but required a ditch across a national forest in order to get that water to their property. *See id.* at 1082-83. The farmers built the ditch pursuant to a permit in the early 1900s and operated it without incident for nearly 100 years. *See id.* In 2000, though, NMFS, the United States Fish and Wildlife Service (FWS) and United States Forest Service (Forest Service) limited the amount of water that could be drawn through the ditch for the benefit of endangered and threatened fish. *See id.* at 1083. Though nothing about the operation of the *ditch* harmed the fish, the government agencies determined that they simply needed more water in the Chewuch River. *See id.* at 1084 ("the biological opinion found that measures were necessary to 'increase the amount of water in the Chewuch River during low flow periods.' "). As here, the Forest Service in *Okanogan* simply denied owners of water rights access to their water because the government wanted it. When the government "physically appropriates [] property, the fact of a taking is typically obvious and undisputed." *Tahoe-Sierra Preservation*

Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 n.17 (2002).

Given the importance of water rights to property in the arid West, this Court should treat water rights as it would any other property. Clear and decisive language recognizing that water rights are co-equal with other property rights will instill certainty in those rights. Rather than a government granted privilege to be freely reallocated among competing users to attain the greatest perceived social (or worse, political) good, the right to use water must be treated as equivalent with rights in real property. Both protect the same end, for " '[p]roperty must be secured or liberty cannot exist.' " *Cannon v. Delaware*, 807 A.2d at 569 (quoting *Discourses on Davila*, *in* 6 *The Works of John Adams* 280).

II

THE NINTH CIRCUIT'S ANALYSIS EFFECTIVELY DESTROYS THIRD PARTY BENEFICIARY STATUS

As Westlands notes, the Ninth Circuit's "narrow view" is inconsistent with this Court's authority and unduly restricts the scope of its inquiry into whether the farmers enjoyed third-party beneficiary status. *See* Westlands Brief at 37.

A. The Ninth Circuit Misstated the Standard for Third Party Beneficiary Status

This Court has held that a person seeking to sue on a contract to which he is not a stated party must "show that it was intended for his direct benefit." *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912). Below, the Ninth Circuit held that the *contract itself* must evince a "clear intent" that the parties intended "to grant [the farmers] enforceable rights." *Orff*, 358 F.3d at 1147. This is a subtle but important transformation of this Court's third party beneficiary standard, and represents an almost impossibly high

burden for third parties to meet. Under the Ninth Circuit's standard, a party may no longer seek to protect its rights by showing the contract was intended for its direct benefit but, instead, must prove the contracting parties intended to grant litigation rights against the contracting parties.

This imposingly high standard turns this Court's *German Alliance* rationale on its head. This Court found that the plaintiffs in that case had no direct interest because the benefit was "only [that] which every citizen has in the performance of every other contract made by and with the government under which he lives." *German Alliance*, 226 U.S. at 231. The farmers in this case, as landowners and beneficial water users, have far more than a "general public interest" in the performance of the contract between BoR and Westlands. Under *German Alliance*, a party must show that the parties intended to directly benefit the third party; under the rule adopted below, a third party must show that the contracting parties intended to see that third party in court.

Regardless of whether the farmers' interest is actually sufficient to grant third party beneficiary status under the proper standard, this Court should not uphold the Ninth Circuit's nearly impossible-to-meet, rogue standard. Rather, this Court should restore its *German Alliance* standard and inquire whether the contract for water deliveries to Westlands for subsequent delivery to the farmers was intended to benefit the farmers. Alternatively, this Court should declare that the Ninth Circuit should have utilized this Court's "direct benefit" standard established in *German Alliance* and remand this case for further consideration consistent with the Court's standard.

B. The Ninth Circuit Improperly Restricted the Inquiry into Third Party Beneficiary Status

In its analysis of whether the farmers qualified for third party beneficiary status, the Ninth Circuit improperly limited itself to the four corners of the contract. *See Orff*, 358 F.3d at 1145-47; *see also* Westlands Brief at 39. As this error no doubt resulted from the improper standard the Ninth Circuit employed, *see section* II.A, *infra*, this Court should re-establish the proper standard. Rather than limiting its review to a narrow "mechanical application" of the contract language, this Court has instructed lower courts to "determine the parties' intent" by reconciling the contract language and surrounding circumstances. *Schneider Moving & Storage Co. v. Prosser's Moving and Storage Co.*, 466 U.S. 364, 370-71 & n.11 (1984). Essentially, this Court determines the parties' intent by analyzing the available evidence surrounding the need for the contract, the service provided, and the parties' motivation for formulating the contract. This traditional rule, which is broader than the Ninth Circuit's new rule, recognizes third party beneficiary status where the parties' intent can be ascertained readily, while limiting this tool to those circumstances in which it is appropriate.

Had the Ninth Circuit reviewed the circumstances under which the contract developed rather than improperly cabining its view, it would have considered the relevant circumstances surrounding both the execution of the 1963 Contract and the purpose for which Congress passed the Reclamation Act which serves as the basis for the contract. For example, the Ninth Circuit should have considered that "Congress passed the Reclamation Act of 1902 in an effort to develop irrigation systems in the Western United States, *with an eye toward agricultural production*." Dow A. Davidson, *Who Wants Some Water: The Ongoing Battle for the Klamath River Basin and the Need for Moderate Institutional Change to End the War*, 34 Cumb. L. Rev. 531, 533 (2003-2004) (emphasis added). The

Ninth Circuit also should have considered that, as part of the 1902 Reclamation Act, Congress declared: "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.

Thus, in determining whether Westlands and BoR intended the 1963 contract to benefit the farmers directly, the Ninth Circuit should have considered that Congress passed the Reclamation Act to "aide[] the average family farmer in covering the substantial up-front costs involved with damming and irrigation works," demonstrating Congress' "understanding of water's central role in the orderly development of the West." Joe S. Whitworth, *A Relic Dam Dislodged by a Dormant Doctrine: The Story of Beneficial Use and Savage Rapids Dam*, 5 U. Denv. Water L. Rev. 183, 187 (2001). When Congress passed the Act, Representative Sutherland, later a member of this Court, advocated for the Act as follows:

> We propose to take the money derived from the sale of the public lands in the sixteen arid-land States and Territories and create a fund to be used for the purpose of rendering this land useful and habitable. In these sixteen States and Territories there are 600,000,000 acres of public lands. After fifty years of effort upon the part of the people there has been cultivated and irrigated only about 7,500,000 acres. The smaller streams have been appropriated and diverted to the last drop. Private enterprise has constructed many canals from the larger streams and many reservoirs for the impounding of the flood waters. The time has arrived, however, when practically nothing more can be done in the direction

> of an increase of the water supply and the consequent increase in the area of cultivated lands without the aid of the National Government.

35 Cong. Rec. 6768 (Rep. Sutherland) (1902).

Although this information may not be dispositive, it is certainly relevant that one of Congress' objectives in passing the Reclamation Act "was to encourage settlement of the West by providing low-cost irrigation water." K. Johnson, *The Mythical Giant: Clean Water Act Section 401 and Nonpoint Source Pollution*, 29 Envtl. L. 417, 452 (1999).

Amici do not suggest that the Court look under every rock and in every tree to see whether a contract benefits some party; rather, amici assert only that courts be permitted to use their general powers of perception and common sense to determine whether a party was an intended beneficiary. Requiring a court to put on blinders that permit it to look only at the words in the contract is unnecessarily cramped and would lead to unjust results. Instead, this Court, while keeping a strong "direct benefit" standard, must permit courts to look beyond the four corners of the contract to the circumstances that motivated the contract. Under this traditional standard, courts examine whether a contract between A and B is made for the direct benefit of C, but may look in obvious places to see if that is really the case. Under the 9th Circuit's new standard, the Court looks only to the contract to see if the parties express that the contract is for the direct benefit of C. This standard is out of step both with this Court's precedents and contractual reality.

This Court should take into account the circumstances surrounding formation of the contract and the enabling legislation allowing BoR to enter into such water delivery contracts when determining whether the farmers are third party beneficiaries. Alternatively, this Court should remand this case to the lower court so that it may consider whether the contracting parties intended the contract to benefit the farmers.

CONCLUSION

This case represents an important opportunity for this Court to clearly articulate that the right to use water is of equal importance to the right to use real property. Clear and decisive language from this Court will dispel the idea that the right to use water is held at the whim of the government to be redistributed as bureaucrats see fit at any given time and will buttress the all-important certainty required in any property right. Further, this Court should recognize that the United States holds, at most, mere title or a nominal ownership interest in the water, *see Nevada v. United States*, 463 U.S. at 126-27, and that "ownership" is dependant upon the water being delivered to Westlands and ultimately the farmers for beneficial use. Finally, this Court should reiterate and apply the correct standard and conduct the proper inquiry for determining whether the farmers are third party beneficiaries to water delivery contracts. Alternatively, after reiterating the correct standard and scope of inquiry, this Court should return the case to the lower court.

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Respectfully submitted,

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